Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT E. BADHAM, *et al.*,

Appellants,

v.

MARCH FONG EU, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of California

APPELLANTS' BRIEF IN OPPOSITION TO MOTION OF THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION TO DISMISS OR AFFIRM

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INTRODUCTION

Appellants have, in their prior briefs, already anticipated and responded to most of the arguments of the California Democratic Congressional Delegation (the "Democratic Delegation") against the Court's exercise of jurisdiction herein. The singular purpose of this brief is to respond to the Democratic Delegation's superficially attractive—but totally misleading—chart purporting to prove that this case is a "mirror image"

of *Davis* v. *Bandemer*, 106 S. Ct. 2797 (1986). *See* Motion to Dismiss or Affirm ("Motion") at 2 & 14-16. These arguments are disingenuous. The contrasts between this case and the record in *Davis* v. *Bandemer* are not so easily camouflaged.

ARGUMENT

Appellants alleged and could prove key facts which were lacking in the record in *Davis* v. *Bandemer* and in the district court's opinion. The *Bandemer* plurality underscored the absence of these facts:

- The district court erred in "[r]elying on a single election to prove unconstitutional discrimination. . .";
- The district court "did not find that the Democrats could not in one of the next few elections secure a sufficient vote to take control of the assembly" and "did not ask by what percentage the statewide Democratic vote would have had to increase" to take control;
- The district court "declined to hold that the 1982 election results were the predictable consequences" of redistricting or a "reliable prediction" of future results;
- "Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status" throughout the 1980's."

See *Davis* v. *Bandemer*, 106 S. Ct. at 2812. Not surprisingly, the Democratic Delegation's chart does not acknowledge these factors. A candid comparison of

Appellants' complaint with the plurality opinion and the record in *Davis* v. *Bandemer* demonstrates the lack of support for the Democratic Delegation's "mirror image" argument and, in fact, presents a compelling case for the exercise of this Court's jurisdiction.

ALLEGATIONS IN THE COMPLAINT BELOW:	RECORD IN *DAVIS* V. *BANDEMER*[2]:
1. Disproportionate results in three separate elections over six years (¶s 26 & 27; Juris. St. at p. 9 and App. G at pp. 200a et seq.).[1]	1. Disproportionate results in one House election; proportionate results in Senate. *Davis* v. *Bandemer*, 106 S. Ct. at 2801, 2813 n.16.
2. Republicans cannot gain a majority of seats (¶ 27).	2. With a net two percentage point vote increase, Democrats could theoretically gain majority in House. *Davis* v. *Bandemer*, Brief of Appellants at pp. 22-23.
3. 1982 election results are "predictable consequence" of redistricting and "reliable predictor" of future election results (¶ 27).	3. No parallel findings. *Bandemer* v. *Davis*, 603 F.Supp. 1479, 1486 (S.D. Ind. 1984).
4. Republicans consigned to minority status throughout the decade (¶ 27).	4. No parallel findings. *See* #2 *supra*.

[1] *Cf. Davis* v. *Bandemer*, 106 S. Ct. at 2814, n. 17 (projected election results may support a partisan gerrymandering claim even where *no* election has been held).

[2] The cited pages of the Brief of Appellants in *Davis* v. *Bandemer* contain specific references to the record in the district court.

5. Redistricting eliminated electoral competition (¶¶ 20 & 28. Juris. St. at p. 9 and App. G at pp. 200a *et seq.*)	5. 39 competitive races in 100 seat House. *Davis* v. *Bandemer*, Brief of Appellants at p. 22.
6. District configurations combined with vote projections can predict future unfair results (¶ 27). *See Davis* v. *Bandemer* 106 S. Ct. at 2815.	6. No parallel findings.
7. Districts of six Republican incumbents unnecessarily collapsed into three districts; no Democrat similarly treated (¶ 21(a)).	7. No parallel finding.
8. As a result of Democratic gerrymander, Republicans lost 4 seats; Democrats gained 6 seats (4 formerly Republican and 2 new seats) (¶ 9 & 26).	8. After so-called Republican "gerrymander," Democrats *gained 9 seats* and Republicans *lost 9 seats*, including 7 incumbents. *Davis* v. *Bandemer*, Brief of Appellants at pp. 8 & 34.

Appellants submit that the effects alleged below are "sufficiently serious to require" this Court's intervention. *See Davis* v. *Bandemer*, 106 S. Ct. at 2811. Unless this Court intervenes, the worst gerrymander of the 1980s will become the model for the 1990s. One commentator put it this way:

> One might add that the California congressional stakes are quite real in national terms. With 45 districts (and more likely after 1990), the state accounts for more than one-tenth of the 435 seats of the House of Representatives. And, in the more immediate context of judicial policy making, as the court goes in the forthcoming California case, so may go the nation as far as the permissible limits of partisan gerrymanders.

Longley, *Partisan Gerrymandering,* 2 International Newsletter, Intl. Pol. Sci. Assn. 29 (Comparative Representation and Electoral Systems Study Group, No. 1) (1987).

CONCLUSION

The Democratic Delegation's motion to dismiss or affirm should be denied, and probable jurisdiction noted.

Respectfully submitted,

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